No. 85-1390

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

FRANCES ARMSTRONG, EMMA WEBBER and JOHN FEDOR, JR.,

Petitioners,

v.

W. BRUCE THOMAS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Counterstatement of the Questions Presented for Review

1. Do unnamed class members who had neither intervened nor in any way participated in the pretrial or trial of a class action have an automatic right to appeal and to raise on appeal issues which the class representatives were themselves pursuing on appeal as well as issues which had not been raised or addressed below?

2. Are petitioners entitled to have this Court determine whether the Court of Appeals had the discretion to permit petitioners to intervene at the appellate level when petitioners never requested leave to do so and the Court of Appeals never decided the issue?

Statement of the Parties to This Proceeding

Respondent Marathon Oil Company is now a wholly-owned subsidiary of Respondent United States Steel Corporation, and portions of its business are operated as separate, wholly-owned subsidiaries of United States Steel Corporation. In addition to its wholly-owned subsidiaries, Marathon Oil Company is affiliated with the following entities:

Arctic LNG Transportation Company
Badger Pipe Line Company
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Petroleum Terminals, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
West Shore Pipe Line Company
Wolverine Pipe Line Company

In addition to subsidiaries which are wholly-owned, including Marathon, Respondent United States Steel Corporation is affiliated with the following entities:

Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, Pa.)

Companhia Meridional de Mineracao
Brazaco-Mapri Industries Metalurgicas S.A.
ITW-Mapri (51% owned by Brazaco-Mapri)
Mecania Walsywa, Ltda.
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda.
Mineracao Maraba, Ltda.
Mineracao Xingu, Ltda.
Termerid Mineracao, SA
Torremco Soc. Min. E. Com. Ltda.
Deepsea Ventures, Inc.
Ocean Mining Associates
FHS Stahlverformung GmbH
FHS Automotive Parts Manufacturing Ltd.
Industria de Tubos y Perfiles, S.A. (Intuperas)
Minerales Ordaz C.A.
Les Entreprises du Lac Lucault Inc.
Sidbec-Normines, Inc.
U.S. Steel France
Zaerust Chrome Mines, Limited
Northern Tier Pipeline Co.
USS MaxTech Company, Inc.
USS MaxTech Company, Ltd.
USS Max Tex Company (Japan), Ltd.
USS Technology (Japan), Ltd.
ACE Holdings, Ltd.
Adela Investment Company, S.A.
Altos Hornos de Viscaya, S.A. (AHV)
Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company
Chrome Deposit Corp. (Court Holdings J.V.)
Jupiter Mining and Prospecting Co. (Pty.) Ltd.
Kappa Mining & Prospecting Co., Ltd.
La Pointe Iron Company
Navios Corporation

Navios Ship Management Services, Inc.
Oresteel Investments (Proprietary), Ltd.
P.T. Pacific Wikkel Indonesia
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinea Pour L'Exploitation Des Monts Nimba (Mifergui Nimba)
Tilden Iron Mining Company
West Union Canal Company, The
Bartow Chemical Products
Century III Associates
Fort Meade Chemical Products
Double Eagle Steel Coating Co.
Live Oak Uranium Operations
Rockland Joint Venture
RMI Company
Tenneco/USS Chemicals Joint Venture
Compagnie Miniere de l'Ogooue (Comilog)
Feralloys, Ltd.
Assoc. Manganese Mines of South Africa, Ltd.
Navios Shipholding, Inc.
Prieska Cooper Mines (Pty.) Ltd.
Terninoss Acciai Inossidabili–S.p.A.
Zuari Argo Chemicals Ltd.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit in the principal action, *Radol, et al.* v. *Thomas, et al.*, is reported at 772 F.2d 244. The decision of the Court of Appeals dismissing the appeals of the petitioners (referred to herein as the "Armstrong Group") was announced at oral argument on January 22, 1985. That decision was embodied in an order dated September 26, 1985. The Armstrong Group's request for rehearing *en banc* of the dismissal was denied in an order dated November 1, 1985.

Copies of these orders, together with an incomplete transcript of a tape recording (some of which is unintelligible and not transcribed) of the oral argument before the Court of Appeals are attached to the petition.

Statutes and Regulations Involved

The following Federal Rules of Civil Procedure are cited in the brief and reproduced in the Appendix:

Rule 23 ..... A1
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I.

Statement

The petition requests this Court to review the dismissal, by a unanimous panel of the Court of Appeals for the Sixth Circuit, of petitioners' attempted appeal from the judgment entered in *Radol, et al.* v. *Thomas, et al.* (and 12 other consolidated class actions), which challenged, under both federal and state law, the acquisition of Marathon Oil Company ("Marathon") by United States Steel Corporation ("U.S. Steel"). That action ended in a judgment, after a jury trial, in favor of defendants on all issues and was unanimously affirmed on appeal. 772 F.2d 244 (6th Cir. 1985). A petition for a writ of certiorari has been filed by the class representatives and is pending before the Court (No. 85-1030).

Petitioners are former shareholders of Marathon and are unnamed members of the *Radol* class. They were also members of the so-called Marathon Shareholders' Committee which actively (and unsuccessfully) sought to defeat

the merger of Marathon into U.S. Steel through a proxy solicitation campaign. When their efforts proved unsuccessful, they elected not to sue for damages but rather to pursue another remedy by seeking a judicial appraisal of their shares under Ohio law.

The *Radol* actions were commenced in various districts in January, 1981. The 13 actions were transferred and consolidated in the Southern District of Ohio. The District Court certified a class, appointed a lead counsel committee consisting of four of the plaintiffs' law firms in the consolidated actions, and directed the filing of a consolidated complaint. In their 42 page consolidated amended complaint (the "Complaint"), the class representatives and lead counsel committee asserted a variety of federal securities law and state law claims challenging, *inter alia,* (a) the structure of U.S. Steel's two-step acquisition of Marathon, (b) the adequacy of the disclosures made to Marathon shareholders at the time of U.S. Steel's first-step tender offer,[1] and (c) the adequacy of the consideration paid to Marathon shareholders in the second-step merger.

1. Plaintiffs' principal nondisclosure claim was that defendants failed to disclose two theoretical asset evaluations prepared by Marathon and its investment banker, which evaluations became known as the Strong and First Boston Reports. As the evidence at trial established, those "Reports" were not disclosed in connection with the tender offer because they were speculative, future oriented evaluations, prepared as optimistic selling tools, and were inherently unreliable and potentially misleading. After the tender offer was completed, a proxy statement was sent to Marathon's shareholders in connection with the proposed second-step merger of Marathon into U.S. Steel (the "Proxy Statement"). The merger was technically a "going private" transaction subject to SEC Rule 13e-3, 17 C.F.R. § 240.13e-3, which required disclosure of, *inter alia,* "outside appraisals," regardless of their materiality. Because the First Boston Report arguably fell within that provision of Rule 13e-3, it was disclosed in the Proxy Statement, and, under those circumstances, the Strong Report was also disclosed, with appropriate disclaimers as to reliability.

In the one and one-half years following service of the Complaint, the parties engaged in extensive pretrial proceedings. These included expedited discovery, a preliminary injunction hearing, class and merits discovery, motions for class decertification and summary judgment and, of course, preparation for trial. The case was tried to a jury in May and June 1983, with the jury rendering a verdict for defendants on all claims submitted to it.

It is undisputed that the Armstrong Group was aware of the *Radol* actions from their commencement. As class members, the Group members received the class notice sent in the Spring of 1982, informing them of their right to opt out or otherwise be bound by any judgment rendered. Despite this notice, they consciously chose not to opt out of, or intervene in, *Radol* or participate in any of the pretrial proceedings in that case. Rather, they elected to sit on the sidelines and let the *Radol* plaintiffs do all the work. It was not until well into the trial that the Armstrong Group surfaced, when it evidently asked class counsel to amend the Complaint to assert a claim, under Section 14(a) of the Securities Exchange Act of 1934 ("1934 Act"), that the Proxy Statement soliciting shareholder approval of the merger contained misrepresentations as to the reliabiliy of the Strong and First Boston Reports.[2] As is apparent from its correspondence with plaintiffs' counsel and the District Court (a copy of which is included in the Appendix, p. A6), the Armstrong Group was closely monitoring developments at the trial and had

2. Specifically, the proposed claim charged that statements that the amounts set forth in the reports were not realizable in a sale of Marathon assets were misleading.

reviewed the trial transcript. Nonetheless, it chose to act solely through the lead counsel committee.

Neither the Complaint nor the Pretrial Order contained any allegation that the description of the Strong and First Boston Reports in the Proxy Statement was deficient or materially misleading. Although this claim was inconsistent with the *Radol* plaintiffs' theory of the case, they nevertheless acceded to the Armstrong Group's request and raised with the Court their desire to make a motion to amend the Complaint. This application was made orally, without prior notice to defendants, on June 9, the day after the completion of plaintiffs' case. The Armstrong Group did not seek to intervene or otherwise participate in the motion. Counsel stated that he wished to "make a motion to amend our complaint to conform to the proof . . . ." (Tr. 1500). In response to defendants' counsels' statement that they need to know the specifics of such an amedment in order to determine whether to object, the Court agreed that plaintiffs should file a written motion and that defendants should have a chance to respond. (Tr. 1501). On June 16, the last day of trial, the *Radol* plaintiffs filed their motion to amend. They did not, however, merely seek to conform the pleadings to the proof, but, rather, sought to set forth for the first time the aforementioned claim asserting that the disclosure of the Strong and First Boston Reports in the Proxy Statement was false and misleading. On June 17 the District Court, in the exercise of its discretion, denied the motion to amend.

Afer the jury returned a verdict in favor of the defendants,[3] the class plaintiffs moved for a new trial, which motion was denied on July 22, 1983. On August 23, 1983, the class plaintiffs filed a notice of appeal.

The Armstrong Group did nothing until after the class plaintiffs filed their notice of appeal. On the last day for filing a notice of appeal, it filed in the District Court a notice of appearance and a motion to intervene for purposes of prosecuting an appeal and a notice of appeal to the Court of Appeals.[4] On September 6, 1983, the District Court denied the motion to intervene; the Armstrong Group filed a notice of appeal from that order on September 19, 1983.[5]

On appeal, the Armstrong Group sought to do a number of things. First, it argued that the District Court erred in denying the motion to amend to add a proxy claim, despite the fact that the *Radol* plaintiffs also appealed that ruling and argued the issue in their brief. The Armstrong Group

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3. The materiality of the Strong and First Boston Reports in connection with U.S. Steel's tender offer was a key issue at trial. The evidence overwhelmingly supported the jury's conclusion that these reports were overstated and inflated sales documents, whose theoretical values bore no reasonable relationship to Marathon's fair market value or any other value the Marathon shareholders could realistically expect to receive for their shares. Based on extensive trial testimony, the jury concluded that (a) the failure to disclose these reports in the tender offer materials did not violate federal securities laws or state fiduciary principles, and (b) the consideration received by the shareholders in the merger was fair. This demonstrates the utter futility of the Armstrong Group's proposed amendment.

4. In addition to the Armstrong Group, an unrelated class member, Alfred Tjarks, who had filed a notice of appearance during trial, filed a notice of appeal.

5. Defendants moved to dismiss both appeals. The motion to dismiss the appeal on the merits was referred to the panel hearing the appeal; by a subsequent order, the Armstrong Group's appeals were consolidated with the *Radol* plaintiffs' and Tjarks' appeals.

also attempted to argue other issues raised and argued by the class representatives in their brief.[6] Finally, petitioners tried to raise issues which the class representatives had either concluded were not worth pursuing and did not address in their brief, or which the *Radol* plaintiffs chose not to raise at all and which therefore were never presented to, or addressed by, the District Court.

At oral argument on the consolidated appeals, the Court of Appeals dismissed the Armstrong Group's appeals. In doing so, the Court of Appeals rejected petitioners' contention that they had an absolute right to appeal as class members and concluded that the District Court had properly exercised its discretion in denying the motion to intervene. The Court, in announcing its decision, gave the following reasons:

> But the court is going to grant the motion to dismiss your appeal, and the reason for that is that the Federal Rules of Civil Procedure present a structure in which these class action cases are to be tried and managed. They are necessarily difficult to manage under any circumstance, and to permit the class members to come in individually after the case has been tried and pursue points on appeal, is not, we just can't contain and manage these actions and there is no precedent for that.[7]

6. This was done despite the fact that the Armstrong Group's attorney volunteered during oral argument before the Sixth Circuit that "[w]e believe the class representatives did an outstanding job presenting the issues they saw important." (Pet. App. 3a).

7. The Court in oral argument had also voiced this concern:

> The Court: You're saying that you're entitled to intervene because you want to emphasize a different issue than the Defendant's [*sic*] counsel.
>
> Armstrong Counsel: That's correct.

(footnote continued on next page)

> It's true that the court below could have granted your petition to intervene, but it did not, and we certainly can't say that Judge Rubin on that point, abused his discretion, and so, the motion filed by the Defendant Appellees to dismiss your appeal because you were not a party in the court below, is granted.[8]

(Pet. App. 4a-5a).

While petitioners assert that the Court of Appeals also ruled that it did not have discretion to permit the Armstrong Group to intervene directly at the appellate level, the Court of Appeals made clear that it did not consider that issue to be before it. When counsel for the Armstrong Group alluded to the Court of Appeals' discretion to permit intervention, the Court stated:

> You didn't ask to intervene in this court. You're appealing the District Court's judgment. So it's not a matter of our discretion.

(Pet. App. 3a). Accordingly, the Court of Appeals did not consider or decide the issue of its power to permit intervention at the appellate level.

The Court of Appeals thereafter denied rehearing *en banc*.

> The Court: Well, that way, we could have everybody in the class intervening because each of them thinks one issue is more important and have 50 lawyers up here on every appeal.

(Pet. App. 3a).

8. The Court of Appeals dismissed Tjarks' appeal for essentially the same reasons. In doing so, the Court noted that proceedings in class actions should not be conducted as "Athenian town meetings" where anyone who wanted to could get up and voice an opinion.

II.

Summary of Argument

The ruling of the Sixth Circuit neither conflicts with the decisions of other circuits nor represents any departure from the accepted and usual course of judicial proceedings. (Pet. 7). *See* Rules of the Supreme Court of the United States, Rule 17. Petitioners have cited no authority to support the proposition that a class member has an absolute right of appeal from a judgment entered in the class action whenever he has filed a post-judgment notice of appearance, and that argument is supported neither by the language nor the structure of the Federal Rules of Civil Procedure. Indeed, petitioners' position would seriously impair the effectiveness of the class action device.

Petitioners' other basis for seeking review of the Court of Appeals' decision is equally without merit. Petitioners never requested leave from the Court of Appeals to intervene at the appellate level, and the Court of Appeals therefore did not decide, as petitioners argue, that it lacked discretion to permit such intervention. There is simply no issue for this Court to review.

III.

Reasons for Denying the Writ

A. Petitioners Had No Right To Appeal The District Court's Judgment, And The Court Of Appeals Did Not Violate Constitutional Or Procedural Requirements In Dismissing That Appeal As Improper.

The first prong of petitioners' argument, that they had an absolute right to appeal from the District Court's judgment, rests on the single premise that, by filing a post-judgment notice of appearance under Rule 23(c)(2)(C), they became parties in the District Court proceeding for all purposes and with all attendant rights. (Pet. 8). That premise is without basis and is fundamentally inconsistent with the purposes behind Rule 23 and with the efficient workings of the federal courts.

In class action suits under Rule 23, the named party-plaintiffs are the representatives of the class and prosecute the action as parties on behalf of all class members. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . ."). An "appearance" under Rule 23(c)(2)(C) does not give the class member the full status and rights of a party; the text of that Rule mentions neither "participation" nor "party." It simply reads: "any member who does not request exclusion may, if he desires, enter an appearance through his counsel."[9]

9. Neither this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), nor 1 Newberg, *Class Actions* §§ 1.07 *et. seq.* (2d ed. 1985), states, or even suggests, that all class members are "parties" who have a right to appeal from an adverse judgment entered on a decision on the merits. Neither even addressed that issue. The *American Pipe* decision addressed the question whether the filing of a putative class action tolled the statute of limitations as to claims of purported class members during the period before a decision denying class certification.

Nevertheless, the Armstrong Group asserts, in effect, that an appearing class member is entitled to the same rights and privileges as a named party-plaintiff, including, specifically, the right to appeal. But that novel contention would render Rule 24 intervention meaningless in class actions. Newberg, the commentator whom the Armstrong Group cites (Pet. 9), acknowledges that the "this entry of appearance [under Rule 23(c)(2)(C)] does not constitute an intervention and does not confer an intervenor's rights on the party." 4 Newberg, *Class Actions* § 22.64 at 126 n.298 (2d ed. 1985).

Professor (later Justice) Kaplan, the reporter for the Advisory Committee on Civil Rules which drafted the 1966 amendments to Rule 23, including what is now Rule 23(c)(2)(C), confirms that the provision was never intended to replace Rule 24 intervention as the mechanism for achieving party status. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 392 n.137 (1967):

> If "appearance" is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under rule 24, which is not automatic and requires a showing.

See also Ramsey v. *Arata*, 406 F. Supp. 435, 442 (N.D. Tex. 1975) (agreeing with Prof. Kaplan's reading of Rule 23(c)(2)(C)).

Indeed, the Armstrong Group implicitly admitted this by its actions in the trial court. Although they now argue that the filing of an appearance alone was sufficient to permit them to appeal, at the same time that they filed

their appearance in the District Court, they moved for leave to intervene. The sole reason for the requested intervention was in order to prosecute an appeal. If, as they now contend, the notice of appearance empowered petitioners to appeal, the motion to intervene was superfluous, for it merely requested a right that, under their present theory, they already possessed.[10]

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10. Petitioners' reluctance to challenge the District Court's denial of leave to intervene is hardly surprising. That denial was a proper exercise of the District Court's discretion for several reasons. The most obvious is that the motion was untimely. Timeliness is, of course, a requirement for both intervention as of right and permissive intervention. *NAACP* v. *New York*, 413 U.S. 345, 365 (1973). The Courts of Appeals have been extremely reluctant to grant post-judgment intervention and have required a strong showing by the parties seeking intervention of their entitlement to relief. *E.g.*, *Delaware Valley Citizens' Council* v. *Commonwealth of Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982); *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976). In this case, the Armstrong Group offered no tenable excuse for the delay in seeking to intervene. As members of the Marathon Shareholders' Committee, which actively opposed the merger of Marathon into U.S. Steel, they were unquestionably aware of the commencement of the *Radol* action in early 1982 and of the efforts of the plaintiffs in *Radol* to enjoin preliminarily the merger of Marathon into U.S. Steel. They subsequently were notified of the class certification decision and of their rights as class members. Nonetheless, the members of the Armstrong Group made no effort to intervene or even to enter an appearance under Rule 23(c)(2)(C) in the action prior to or during trial, although, as their correspondence in the Appendix (p. A6) demonstrates, they were fully aware of developments at trial. Nor is there present any circumstance, such as a failure of the class representatives to file an appeal, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), which could have excused this untimely attempt to intervene.

Moreover, under Rule 24(a), a finding of inadequate representation is a prerequisite to intervention as of right. The burden of proof rests on the party seeking intervention, *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), and the cases have required a compelling showing of inadequacy to meet that burden. *E.g.*, *Stadin* v. *Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963). *See Delaware Valley Citizens' Council* v. *Commonwealth of Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982).

(footnote continued on next page)

None of the cases cited by petitioners supports their current position. Every case cited for the proposition that class members "have standing to appeal from adverse decisions and object to settlements" is in fact a case where class members had, in response to a Rule 23(e) settlement notice, appeared and raised objections to a proposed settlement. Those cases are inapposite. In the first instance, in the settlement cases cited by petitioners, because the class representatives have supported the settlement or compromise, there will be no appeal of the settlement unless those class members who have raised objections to it are permitted to prosecute an appeal from the rejection of their objections. In this case, the class representatives have vigorously pursued an appeal from the adverse judgment entered in the District Court. Thus, petitioners here do not seek to appeal a decision which will, absent their appeal, never be reviewed. Rather, they are merely attempting to second guess the class representatives in their prosecution of that appeal.

Moreover, even in the settlement context, actual appearance and participation is the *sine qua non* of an objecting

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The Armstrong Group made no such showing here. There was no charge of collusion or conflict of interest or incompetence on the part of the lead counsel committee. To the contrary, the trial court not only determined at the time of class certification that the named plaintiffs "will fairly and adequately protect the interests of the class" (Rule 23(a)(4)) but, on several occasions during the trial, unqualifiedly praised the handling of the case by the lead counsel committee: "I think the representation the class Plaintiffs are receiving is outstanding. I don't see any reason to add to or supplement Plaintiffs' counsel." (Tr. 1314; *accord* Tr. 1500-01, 2290). Nor did the Armstrong Group seriously contest the adequacy of representation by class counsel. At oral argument in the Sixth Circuit, counsel for the Armstrong Group acknowledged that "the class representatives did an outstanding job presenting the issues that they saw important. . . ." (Pet. App. 3a).

class member's right to appeal from the settlement. In *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970) (Pet. 9), unnamed members of a defendant class had failed to raise any objection to a consent judgment and took no action until after the settlement negotiated by the parties had been approved by the District Court. While the Court of Appeals noted that a class member who intervenes or "appears in response to a notice pursuant to Fed R Civ P 23(e) and objects to the dismissal or compromise . . . has a right to appeal from an adverse judgment," it dismissed the appeal because "[a] person in disagreement with the terms of a settlement must take, at least, these minimal steps to preserve his right to appeal." Much like the class members in that case, the Armstrong Group in this case did nothing until eight weeks after judgment was entered.

The procedure envisioned by petitioners is contrary to the structure of the Federal Rules of Civil Procedure and the rationale of the procedural devices available for handling complex class action litigation. The multiple devices of transfer under 28 U.S.C. § 1404, consolidation under Fed. R. Civ. P. 42(a), class action certification under Rule 23(b)(3), and appointment of lead counsel pursuant to Rules 23(d) and 42(a) were designed to permit the handling of actions such as the present one with a maximum of convenience, economy and expedience. *See generally In re Air Crash Disaster*, 549 F.2d 1006 (5th Cir. 1977). The use of these devices in the *Radol* case permitted 13 alleged class actions, brought in many different districts, by different counsel and asserting different theories of recovery,

to be unified for pretrial and trial purposes and to be brought to trial and decided within 18 months after filing.

There can be no doubt that the use of these devices limits to some extent the power of an individual included within a class action to control the prosecution of that action. However, even the limitations contemplated by these devices are carefully circumscribed. Rule 23(b)(3) requires explicit consideration by the court of the individual's interest in pursuing his own claims, as well as the difficulties likely in the management of a class action. In the instant case, such determinations were made by the District Court before ordering consolidation and certification.

Moreover, Rule 23 clearly provides that notice is required in any class action maintained under subdivision (b)(3), that such notice is to advise each member that the court will exclude him from the class if he so requests by a specified date, and that any member who does not request exclusion may, if he desires, enter an appearance through his counsel. Thus, class members who wish to play a more active role are given various alternatives, including the right to maintain their own individual suits if they so desire. Here, both personal and published notice was given. That notice informed class members of the procedures by which they could opt out of the class and that the class would be represented by the lead counsel committee.

Rule 23(c)(2)(A) places an affirmative duty on the class member to act in order to exercise the right to exclusion from the class, and expressly limits the life span of that right. Language requiring an exclusion "if he so requests by a specified date," was added to the Rule to prevent

"sideline sitting," *i.e.*, "delaying . . . decision about whether to join the action until the case reaches judgment." *Robinson* v. *Union Carbide Corp.*, 544 F.2d 1258, 1262 (5th Cir.) (Wisdom, J., concurring), *cert. denied*, 434 U.S. 822 (1977). This Court has interpreted this language to mean that: "[P]otential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action . . . and they are sent notice of their inclusion within the confines of the class." *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 549. Once notice has been received, the class member has an affirmative duty "to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *Id.* at 552.

The affirmative duty to opt out within a specified period of time is necessary in order to allow defendants to make a reasonable appraisal of the dimensions of the suit they are facing. It is also a reflection of the overall structure of Rule 23 allowing class members to remain passive. In addition, "[b]y not excluding themselves from the class . . . class members must be deemed to recognize and yield to the need for a unified representative effort in behalf of all members of the class so that the litigation may proceed in an orderly fashion." Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. Indus. & Com. L. Rev. 577, 588 (1969).

The Armstrong Group neither opted out of the class nor took advantage of its right to attempt to intervene at any time before judgment. Instead, it "sat on the sidelines," while the case proceeded through a preliminary

injunction hearing, extensive discovery, two sets of summary judgment motions, a pretrial order and, indeed, through trial, verdict, the entry of judgment and post-trial motions.

One of the principal considerations of the Advisors in redrafting Rule 23 in 1966 was to eliminate "one-way intervention"—that is, the practice of class members who "sit on the sidelines" and only become parties to the action after a judgment favorable to the class has been entered. Advisory Committee Note, 39 F.R.D. 69 (1966); *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 547. What the Armstrong Group hopes to accomplish here is a new version of "one-way intervention." Only after judgment had been entered against the class did that Group seek to intervene to assert a new theory of recovery and to request a retrial. Repetitious litigation of this type is just the sort of result that the consolidation, appointment of lead counsel, and class action certification techniques were designed to prevent. As the Court of Appeals properly recognized, the result sought by petitioners here would make it impossible for the courts to manage and control class action litigation and would vitiate the carefully structured provisions of the federal rules.[11]

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11. The fact that four rather than 50 class members sought to separately prosecute two additional appeals in this case (Pet. 9) hardly eliminates the problem. Indeed, even the two additional appeals posed significant management problems—they tripled the volume of briefs before the Court and presented a number of issues which, although meritless, had never been raised at any stage of the litigation.

B. Petitioners Failed To Request Permission From The Court Of Appeals To Intervene In The Appeal And Did Not Offer Any Grounds That Would Have Supported Intervention.

The second ground offered by the petitioners for a writ of certiorari is plainly misconceived, for it invites this Court to review an issue that was not decided below. The Armstrong Group never sought permission from the Court of Appeals to intervene in the appeal, and the Court of Appeals did not decide whether it had the power to grant intervention or the circumstances in which it would do so. This is clear from the transcript of oral argument. In response to a suggestion by petitioners' counsel that the Court of Appeals had discretion to permit intervention, the Court noted: "You didn't ask to intervene in this court. You're appealing the District Court's judgment. So it's not a matter of our discretion."[12] Petitioners' counsel did not disagree or point to any request for intervention. Even when the Court of Appeals specifically asked petitioners' counsel "why do we have discretion?" counsel did not point to any request to intervene in the Court of Appeals or at that point make a request to intervene.[13] The Court in announcing its decision made no mention of the issue.

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12. Thus, the Court of Appeals did not say during oral argument, as petitioners suggest, that "it had no independent discretion to allow petitioners' appellate appearance." (Pet. 12 n.7). It merely stated that petitioners had never made a proper request of the Court to grant such relief and that the question of its discretion was not at issue.

13. Petitioners' efforts to excuse the lack of a request (Pet. 12, n.7) miss the point. Petitioners do not seek review of the Court of Appeals' decision not to consider intervention absent a request by petitioners that it do so. Rather they seek review of an issue—whether the Court had power to permit a non-party to intervene in an appeal—which was never raised in, or decided by, the Court of Appeals.

Because the Sixth Circuit did not address the issue of its power to permit intervention, this issue is not an appropriate subject for this Court's review.[14] As this Court has repeatedly held, it will not consider issues that were not raised or considered in the lower court. *E.g., Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984) ("Because petitioner did not present this argument to the Court of Appeals, we decline to consider it."); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10, *reh'g denied*, 459 U.S. 899 (1982) ("This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it.").

Even if they had brought the issue before the Court of Appeals, petitioners did not demonstrate that intervention should have been granted. While petitioners cite no federal authority in which such relief was in fact granted at the appellate level,[15] the cases cited do make clear that, if intervention is available at all, it may be permitted "[o]nly in an exceptional case for imperative reasons. . . ." *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (Pet. 13).

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14. Petitioners' purported conflict of the Sixth Circuit's decision with other Courts of Appeals' decisions suggesting that there is power to permit intervention is, of course, nonexistent for the same reason.

15. Neither *Overby* v. *United States Fidelity & Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955), nor *Preston* v. *United States*, 284 F.2d 514 (9th Cir. 1960) (Pet. 13-14), presented the issue. The courts in *Holland* v. *Board of Public Instruction*, 258 F.2d 730 (5th Cir. 1958), and *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778 (5th Cir. 1962) (Pet. 12, 13), denied requests to intervene at the appellate level.

Such a showing is absent here. Petitioners do not challenge the adequacy of representation by lead counsel at the trial level. They argue only that their interests were not being adequately represented at the appellate level. The essence of that claim is not that counsel in *Radol* failed to present effectively the principal arguments addressed on appeal but that more emphasis could have been given to some issues and that there are other issues that should have been addressed. More specifically, the Armstrong Group sought to repeat in its brief the claim, argued by the *Radol* plaintiffs in their appellate brief, that the trial court improperly denied the *Radol* plaintiffs' request for leave to amend the Complaint at the end of their case, as well as various other claims addressed by the *Radol* plaintiffs.

While many of the points sought to be raised by petitioners were repetitious or, at most, semantic variations of issues submitted to the jury, decided adversely to the class, and appealed by the class representatives, the Armstrong Group also sought to raise issues that were never presented to the District Court—and therein lies the true motive (and real vice) of its belated efforts. Thus, petitioners sought to assert myriad violations of Rule 13e-3 that were raised for the first time on appeal and to argue the purported invalidity of the merger on grounds that were never raised below. None of these new claims was part of the record in the District Court, and, thus, the claims were not properly before the Court of Appeals.[16]

16. It is axiomatic that issues not raised before the District Court cannot be raised on appeal. *E.g., Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), *rev'd on other grounds sub nom. International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3956 at 386 (1977) & 277 (Supp. 1985); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 210.04[1] at 10-15 (2d ed. 1985).

This is a classic case of second guessing the tactics employed by lead counsel and cannot form a basis for a finding of inadequate representation. It has repeatedly been held that mere differences of opinion as to the handling of the prosecution or defense of an action, in the absence of indications of incompetence, are insufficient to demonstrate inadequacy of representation. *Gustave* v. *United States,* 627 F.2d 901, 904 (9th Cir. 1980) ("Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequacy of representation."); *Bumgarner* v. *Ute Indian Tribe of Uintah & Ouray Reservation,* 417 F.2d 1305, 1308 (10th Cir. 1969) ("Appellants do not question the competency of the . . . attorney . . . [but they] apparently would have handled the defense of the case differently. . . . This however is not sufficient to challenge the adequacy of representation.); *Stadin* v. *Union Electric Co.,* 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied,* 373 U.S. 915 (1963) ("Mere difference of opinion among attorneys is not of itself inadequate representation. If it were, intervention of right would become almost automatic.").

Here, lead counsel made a strategic decision not to challenge the disclosures in the Proxy Statement. While that decision may be at odds with what the Armstrong Group in hindsight thinks should have been done, it can hardly serve as the basis for a claim of inadequate representation.

In essence, what petitioners are seeking here is a "free ride" on the efforts of the named plaintiffs. The result they seek, if adopted, would permit *any* member of a properly certified class to appear suddenly on appeal to challenge an adverse determination or to add new claims or causes of action, merely by complaining about the adequacy of repre-

sentation on the appeal. Such a result would seriously undermine the efficacy of class action litigation, would create manageability problems for district and appellate courts, would eviscerate the opt-out provisions of Rule 23, and would inundate appellate and trial courts with a constant barrage of criticisms and suggestions by well-intentioned but inadequately informed class members who themselves have not been active participants in the action, who have not subjected themselves to discovery and who cannot themselves satisfy the requirements of Rule 23.

Quite simply, petitioners' rights were amply protected by the opt-out provision of Rule 23(c)(2)(A), by the notice sent to all class members and by the availability of Rule 24 intervention. Given these opportunities to proceed on their own, petitioners voluntarily chose to waive those rights and instead elected to avail themselves of the considerable benefits of class member status. They should not be heard now to complain that they should have it both ways.

IV.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Dated: March 1, 1986

APPENDIX

Rule 23. Class Action

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do

not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favoable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims

or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or

defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

LETTERHEAD OF

WILLIAMS & CONNOLLY

June 8, 1983

Melvyn I. Weiss, Esquire
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One Pennsylvania Plaza
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Dear Mel:

We are writing on behalf of the members of the Marathon Shareholders Committee who are also members of the class in your Marathon suit and who have been disqualified from the Shareholders Committee's appraisal action in the Findlay, Ohio, Common Pleas Court. Among the Committee members who we represent in this matter is John Fedor, Jr., of New Jersey.

Specifically, we request you to petition the court to amend your complaint to conform to the proof by adding the following allegations:

1. The paragraph on page 13 of the Marathon "merger" proxy statement of February 8, 1982, which states:

> "The net asset values discussed in the (First Boston) Report, the (Strong) Evaluation and the (First Boston) Summary were not viewed by Marathon's Board of Directors as being reflective of, and do not represent, per share values that could realistically be expected to be received by Marathon or its shareholders in a negotiated sale of the Company as a going concern or through liquidation of the Company's assets."

was false, the defendants knew it was false, the defendants intended to deceive the shareholders, the shareholders relied on the statement, the shareholders were deceived, and this conduct violated the securities laws and the result was that the shareholders were damaged.

2. The defendant Marathon directors breached their fiduciary obligations by entering into—and recommending to shareholders—a merger agreement that sold the Marathon Oil Company for slightly over $6 billion when the Company's assets in a liquidation or partial liquidation were worth as much as $14 billion.

Page 720 line 23 of the trial transcript establishes that Marathon management considered Marathon's interest in the Yates Field to be 20 percent of Marathon's asset value. In addition, it was established (trial transcript page 204 line 17) Marathon management considered the $2.8 billion option granted U.S. Steel for Marathon's interest in the Yates Field the minimum acceptable option price. The reasonableness of the $2.8 billion price was confirmed (see trial transcript page 209 line 13) by First Boston. The 20 percent share of Marathon's asset value represented by the Yates property coupled with a value for the Yates property of $2.8 billion suggests Marathon was valued by its management at five times the $2.8 billion value placed on Yates or in the neighborhood of $14 billion.

First Boston on page 2 of their Marathon valuation report estimates Marathon's net equity value is between $11.070 and $13.249 billion. This suggests that while Marathon management was valuing Marathon assets at approximately $14 billion, the highest value First Boston placed on the Company was less—$13.249 billion, and thus, obviously in the eyes of management reflective of asset value.

Again we emphasize that the allegations contained in the amendments to the complaint we are requesting have already been proved. We are not requesting you to add anything new, or to extend the trial. The proof of the additional allegations are in the trial record. However, on the basis of your conversation with Mr. McElroy, it is clear that you did not contemplate this allegation nor are they contained within your complaint.

Sincerely,

/s/ Donald E. Schwartz

Donald E. Schwartz

/s/ Paul Martin Wolff

Paul Martin Wolff

cc: Jacob K. Stein, Esq.
Paxton & Seasongood

Stuart Savett, Esq.
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DES/bb